

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GROUND ZERO CENTER FOR
NONVIOLENT ACTION,
WASHINGTON PHYSICIANS FOR
SOCIAL RESPONSIBILITY, and GLEN
S. MILNER,

Plaintiffs,

and

THE SUQUAMISH TRIBE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
THE NAVY, et al.,

Defendants.

Case Nos.: 12-cv-1455

ORDER

(Dkts. #76, 78)

1 The Suquamish Tribe and the Port Gamble and Jamestown S' Klallam Tribes request
2 reconsideration of the Court's Order Denying Plaintiffs' Motion for a Preliminary Injunction
3 (Dkt. #73).

4 Under Local Rule 7(h):

5 Motions for reconsideration are disfavored. The court will ordinarily deny such motions
6 in the absence of a showing of manifest error in the prior ruling or a showing of new facts
or legal authority which could not have been brought to its attention earlier with
reasonable diligence.

7 The Ninth Circuit has called reconsideration an "extraordinary remedy, to be used sparingly in
8 the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of*
9 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quoting 12 James Wm. Moore et al., *Moore's*
10 *Federal Practice* § 59.30[4] (3d ed. 2000). "Indeed, a motion for reconsideration should not be
11 granted, absent highly unusual circumstances, unless the district court is presented with newly
12 discovered evidence, committed clear error, or if there is an intervening change in the controlling
13 law." *Id.* (quoting *389 Orange Street Partners*, 179 F.3d 656, 665 (9th Cir. 1999)).

14 The Court finds the tribes' concerns largely semantic and will alter the language of the
15 Order to address their concerns.

16 The S' Klallam Tribe presents three arguments (in which the Suquamish join). First, the
17 S' Klallam argue that the Court's statement that the Suquamish have "primary [fishing] rights"
18 north of the Hood Canal Bridge is inaccurate. The Suquamish have rights in common with other
19 tribes, but they do not control or regulate fishing. The Court used the term "primary" to explain
20 that the Suquamish's rights are not subject to the regulation of another tribe north of the Hood
21 Canal Bridge.
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1 Second, the S’Klallam argue that in the Order, the “Court seemed to presume a party
2 must have a primary right to be considered.” (S’Klallam Mot. for Recon. at 3, Dkt. #76.) The
3 Court does not so presume.

4 Third, the S’Klallam “object that the primary right holder can take an action to abrogate
5 the treaty right of other Tribes in the area.” (S’Klallam Mot. for Recon. at 3, Dkt. #76.) In
6 moving for a preliminary injunction, the Suquamish argued that the Navy cannot “dispense with
7 the Suquamish’s treaty right by obtaining the consent of another tribe.” (*See* Suquamish Mot. for
8 Prelim. Inj. at 10, Dkt. #15.) The Order states: “They are correct. the Navy cannot. However,
9 the Suquamish can, and appear to have done so.” (Order at 27, Dkt. #73.) The Court then
10 explained that the Skokomish possess the power to regulate fishing by secondary rights holders
11 in Hood Canal. Indeed, the Skokomish can—and have—barred the Suquamish from fishing
12 south of the Hood Canal Bridge since 1985. The Order concluded: “If the primary right holder
13 has agreed that the Navy’s mitigation plan will compensate for any loss, it is difficult to see how
14 a secondary right holder can challenge the plan.” *Id.*

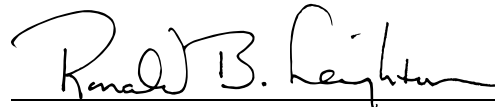
15 To be clear, the Court did not rule that the Skokomish may abrogate the Suquamish’s
16 treaty rights. But as a practical matter, the Skokomish may agree—and may enter a written
17 agreement—with the Navy that the proposed mitigation plan compensates for any loss of
18 resources. (*See* Order at 27, Dkt. #73.) The Skokomish need not consult with the Suquamish to
19 form that agreement. It remains difficult to see how the Suquamish will succeed in showing that
20 the EHW-2 “abrogates” their treaty rights when the primary right holder has agreed that the
21 Navy’s mitigation plan compensates for any resource loss in the area.
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1 The Court did not suggest that the Suquamish could never challenge actions in areas
2 where it holds secondary rights, and it does not suggest that the Skokomish may legally abrogate
3 the Suquamish's treaty rights.

4 Lastly, the Suquamish argue that the Court committed manifest error by reasoning that
5 the Tribe could not lose access to fishing inside Naval Base Kitsap because they currently do not
6 have access. The Tribe argues that the base commander could potentially grant access, and thus,
7 EHW-2 abrogates tribal rights to the water it will cover. The Court finds no manifest error.

8 For the reasons set forth above, the motions for reconsideration (Dkts. #76 and 78) are
9 **GRANTED IN PART** and **DENIED IN PART**.

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11 Dated this 29th day of January 2013.

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15 Ronald B. Leighton
16 United States District Judge
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